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## Warehousemen—Storers of Grain—Arkansas Stands Alone in Protecting the Rights of Depositors of Grain in Public Warehouses

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**WAREHOUSEMEN—STORERS OF GRAIN—ARKANSAS STANDS ALONE IN PROTECTING THE RIGHTS OF DEPOSITORS OF GRAIN IN PUBLIC WAREHOUSES. *Cooper, Inc. v. Farm Bureau Mutual Insurance Co.*, 289 Ark. 218, 711 S.W.2d 155 (1986).**

Cooper, Inc. (Cooper) and Vernon Block were farmers who delivered soybeans to Harrisburg Elevators, Inc. (Harrisburg), during October and November of 1982. Combined, Cooper and Block delivered over 26,000 bushels of soybeans to Harrisburg, which were stored and commingled with other soybeans held by Harrisburg. Cooper and Block entered into deferred purchase price contracts with Harrisburg upon delivery of the beans, which gave Cooper and Block, as sellers, the right to complete a sale of the soybeans to Harrisburg at a future date of their choosing. Cooper and Block could conclude the sale and receive a final price for the beans based on Harrisburg's daily purchase price for soybeans on or before the opening of business on the date chosen. Cooper and Block received advance payments of \$4.50 per bushel on the soybeans delivered to Harrisburg.

The soybeans stored by Harrisburg were eventually sold to four grain companies,<sup>1</sup> also joined as defendants in this action. In March, 1983, the Arkansas State Plant Board suspended Harrisburg's license following an audit of the company. Consequently, the elevator was forced to file bankruptcy. Cooper and Block in separate actions brought suit against Harrisburg, Arkansas Farm Bureau Insurance Company (as surety on Harrisburg's bond), and the four grain companies for damages resulting from Harrisburg's inability to perform its contractual obligation.

In their complaints Cooper and Block alleged that deficiencies in the written deferred purchase price contracts prevented transfer of title to the soybeans to Harrisburg until a final price was determined and the sale closed, and that Harrisburg had unlawfully converted the soybeans it stored by selling them to the four grain companies. The alleged deficiencies included Harrisburg's failure to specify that title to the stored beans was transferred to Harrisburg prior to the conclusion of the sale. Cooper and Block alleged damages in an amount equal to the difference between the market price per bushel of \$6.63 and the ad-

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1. The four grain companies joined as defendants were the Continental Grain Company, the Pillsbury Company, Cargill, Inc., and the Archer-Daniels-Midland Company. *Cooper, Inc. v. Farm Bureau Mut. Ins. Co.*, 289 Ark. 218, 219, 711 S.W.2d 155, 157 (1986).

vances received from Harrisburg.

The trial court sustained the motion for summary judgment brought by Harrisburg and the four grain companies, finding that by entering into the contracts and receiving the \$4.50 per bushel advances, Cooper and Block effectively conveyed title to the soybeans to Harrisburg. The court held that since title was conveyed, no action for conversion existed as a matter of law. The court granted summary judgment on behalf of Arkansas Farm Bureau Insurance Company because Cooper and Block held no warehouse receipts for the stored soybeans, a required condition for payment on Harrisburg's bond.

The Arkansas Supreme Court consolidated the two cases for the purpose of appeal. The supreme court affirmed the summary judgment granted on behalf of Arkansas Farm Bureau Insurance Company, but reversed as to the summary judgment granted to Harrisburg and the four grain companies, holding that the contracts used by Harrisburg failed to comply with Act 401<sup>2</sup> and that as a result, title to the beans was not transferred. *Cooper, Inc. v. Farm Bureau Mutual Insurance Co.*, 289 Ark. 218, 711 S.W.2d 155 (1986).

In Arkansas, prior to the adoption of the Uniform Commercial Code (U.C.C.) public grain warehousemen were governed by the common law principles of bailments.<sup>3</sup> A depositor of grain in a public warehouse always had an action in conversion against a warehouseman who sold his grain without the depositor's authorization.<sup>4</sup> A transfer by a warehouseman was void; that is, no title could be transferred for any goods that the warehouseman misdelivered or misappropriated.<sup>5</sup> The depositor could recover either the actual goods or their value from anyone who received the goods from the warehouseman.<sup>6</sup> Thus, the depositor could recover either from the warehouseman himself or the party currently in possession of the grain.<sup>7</sup>

Arkansas adopted the U.C.C. in 1961 for the purpose of expediting commercial transactions.<sup>8</sup> The U.C.C. brought with it the concept

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2. 1981 Ark. Acts 705 (codified at ARK. STAT. ANN. § 77-1340 (1981)).

3. *Creson v. Ward*, 66 Ark. 209, 49 S.W. 827 (1899).

4. *Newburger Cotton Co. v. Stevens*, 167 Ark. 257, 267 S.W. 777 (1925); *Creson* at 211, 49 S.W. at 827.

5. *Newburger Cotton Co.* at 262, 267 S.W. at 778; *Creson* at 211, 49 S.W. at 827.

6. *Newburger Cotton Co.* at 263, 267 S.W. at 778.

7. *Id.*

8. Act of March 7, 1961, No. 185, § 1-102(2), 1961 Ark. Acts 421 (codified as ARK. STAT. ANN. § 85-1-102(2) (1961)).

of "voidable" title<sup>9</sup> and "buyers in the ordinary course of business."<sup>10</sup> Since a public grain warehouseman is in the business of buying and selling grain, any purchaser of grain who purchases in good faith and without knowledge that the warehouseman does not have title to the grain at the time of the purchase is protected. The depositor of the grain cannot collect from him either the actual grain or the value thereof.<sup>11</sup> Originally, the U.C.C. only protected good faith purchasers who bought from parties guilty of theft by either trick or fraud,<sup>12</sup> but the U.C.C.'s protection was eventually extended by statute to cover any situation involving circumstances resembling theft by a bailee.<sup>13</sup>

The U.C.C. operated to protect buyers in the ordinary course of business<sup>14</sup> and to sever the right of a grain depositor to recover from such a buyer.<sup>15</sup> The U.C.C. addressed two unique problems associated with depositors of grain and public grain warehousemen. First, grain is a fungible good<sup>16</sup> that is necessarily commingled for storage. Second, a depositor of grain "entrusts" the warehouseman with possession of the grain.<sup>17</sup> By entrusting the grain to a warehouseman in the business of buying and selling grain, the depositor exposes himself to the risk that the warehouseman could transfer all rights to the depositor's grain to a buyer in the ordinary course of business.<sup>18</sup> At the same time, the depositor exposes himself to the risk that the warehouseman could overissue warehouse receipts for the grain stored by him; consequently, the depositor could be forced to accept a pro rata share of his grain stored by the warehouseman.<sup>19</sup>

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9. ARK. STAT. ANN. § 85-2-403 (1961) (a person with voidable title has the power to transfer good title to a good faith purchaser, while one who has void title cannot transfer good title).

10. ARK. STAT. ANN. § 85-1-201(9) (Supp. 1985) (a buyer in the ordinary course of business is any person who purchases goods from a person in the business of selling goods in good faith and without knowledge that the sale is in violation of the ownership rights of another).

11. ARK. STAT. ANN. § 85-7-205 (1961) (amended 1981) (the statute protects a buyer in the ordinary course of business from the claims of a person holding a valid warehouse receipt if the buyer purchases in good faith).

12. U.C.C. § 2-403 commentary (1972).

13. *Id.*

14. ARK. STAT. ANN. § 85-7-205 (1961) (amended 1981).

15. ARK. STAT. ANN. § 85-7-503 (1961) (as entrustors, grain depositors holding valid warehouse receipts are denied from recovering directly from buyers in the ordinary course of business).

16. ARK. STAT. ANN. § 85-1-201(17) (Supp. 1985).

17. ARK. STAT. ANN. § 85-2-403(2) (1961).

18. ARK. STAT. ANN. § 85-2-403 (1961) (the warehouseman would possess voidable title to the grain stored in his warehouse and could convey the grain to a buyer in the ordinary course of business, thereby severing the rights of the depositor).

19. ARK. STAT. ANN. § 85-7-207 (1961) (in the case of an overissue of warehouse receipts, the holder of a warehouse receipt is entitled to recover that portion of his grain stored by a warehouseman that bears the proportion of the grain evidenced by his warehouse receipt to the total of

The U.C.C. sought to place new emphasis on, and generate acceptance of, the concept of warehouse receipts. Warehouse receipts are receipts issued by a person engaged in the business of storing goods.<sup>20</sup> A warehouse receipt under Arkansas law must embody certain written terms in order to be effective and to protect the warehouseman from liability to a grain depositor.<sup>21</sup> One problem with the emphasis placed on warehouse receipts under the U.C.C. involves the nature of the grain storage business. Grain harvesting is seasonal in nature, which results in a great deal of grain being delivered to public grain warehouses in a very short period of time. Often grain depositors do not take the time to get a warehouse receipt nor do the warehousemen take the time to issue one.<sup>22</sup>

Grain depositors usually receive a "scale ticket"<sup>23</sup> to show the warehouseman's receipt of the grain. Scale tickets are issued by a warehouseman when grain is delivered, but only indicate the name of the depositor, the amount (weight or bushel) of the deposit, and the date of the deposit.<sup>24</sup> Though a scale ticket fails to meet the criterion established for a warehouse receipt in the form required under the U.C.C.,<sup>25</sup> Arkansas has by statute extended the definition of a warehouse receipt to include unpriced scale tickets.<sup>26</sup> By doing so the legislature mitigated one of the inherent problems associated with the agricultural industry during harvest time; however, depositors of grain were still faced with the risk that a warehouseman could transfer title to his

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all the grain evidenced by warehouse receipts).

20. ARK. STAT. ANN. § 85-1-201(45) (Supp. 1985).

21. ARK. STAT. ANN. § 85-7-202(2) (1961) provides that a warehouse receipt must include the following terms: (1) the location of the stored goods; (2) the date of issue; (3) the consecutive number of the receipt; (4) a statement specifying to whom the goods are to be delivered; (5) the storage rates and handling charges; (6) a description of the goods; (7) the signature of the warehouseman; and (8) the amount of any advances made or liens claimed by the warehouseman. If a warehouse receipt contains all of the above information, the warehouseman is free to convey good title under U.C.C. § 2-403.

22. Note, *Act 401 of the Public Grain Warehouse Law: An exception to the U.C.C. Concept of Voidable Title*, 37 ARK. L. REV. 293, 298 n.33 (1984). More often than not, farmers will take scale tickets at the time of delivery and get the warehouse receipt later. *Id.* ARK. STAT. ANN. § 77-1325 (Supp. 1985) requires a warehouseman to issue warehouse receipts for all grain stored by him.

23. A scale ticket is a receipt issued by a warehouseman when grain is delivered for storage, but it does not embody enough information on its face to qualify as a warehouse receipt. The scale ticket merely shows the date, quantity, and owner of the grain delivered. Note, *supra* note 22, at 298 n.33.

24. *Id.*

25. See ARK. STAT. ANN. § 85-7-202(2) (1961). See also Note, *supra* note 22, at 298 n.33.

26. ARK. STAT. ANN. § 77-1302(g) (Supp. 1985).

grain to a buyer in the ordinary course of business.<sup>27</sup>

In the wake of numerous elevator bankruptcies and the publicity received by the Wayne Cryts case,<sup>28</sup> a great deal of attention was focused on the regulation of public grain warehouses in the early 1980's.<sup>29</sup> Frustrated with the problems associated with elevator bankruptcies, Arkansas farmers complained to their state legislators and called for changes in state law governing the title of grain stored in public grain warehouses.<sup>30</sup> Elevator bankruptcies cause economic problems for grain depositors, since they are usually forced to take a pro rata share of the grain deposited due to an overissuance of warehouse receipts. Additionally, what grain they are able to recover may be tied up in court for a number of years. Apparently influenced by the complaints of their constituents, state legislators introduced and passed Act 401 in March of 1981.<sup>31</sup>

Act 401 was passed to clarify state law governing the ownership of grains stored by public grain warehousemen and to protect grain depositors from warehousemen who sell or encumber a depositor's grain without authorization to do so.<sup>32</sup> The title of Act 401 provided that the ownership of grain shall not be transferred merely upon delivery of the grain to a public grain warehouseman, or by the warehouseman's possession thereof, but only by the depositor's execution of a written document specifically transferring title to the grain.<sup>33</sup> Under Act 401 a warehouseman may not sell or encumber any grain in his possession unless the owner of the grain has transferred title to the warehouseman

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27. See ARK. STAT. ANN. § 85-2-403 (1961).

28. *Missouri v. United States Bankruptcy Court*, 647 F.2d 768 (8th Cir. 1981). Wayne Cryts, a Missouri farmer, raided a bankrupt grain elevator in violation of a restraining order to recover grain that he previously stored in the elevator. The elevator bankruptcy was due to excessive overissuance of warehouse receipts, leaving the elevator without enough grain to satisfy depositors' claims, and Cryts decided to forcibly remove his grain from the elevator.

29. *Farm Bureau Mut. Ins. Co. v. Wright*, 285 Ark. 228, 686 S.W.2d 778 (1985) (discussing the farm crisis following the removal of grain stored in a bankrupt elevator by Wayne Cryts in violation of a bankruptcy court order). See also *Missouri v. United States Bankruptcy Court*, 647 F.2d 768 (8th Cir. 1981).

30. Note, *supra* note 22, at 295 n.15, and accompanying text.

31. Act of March 10, 1981, No. 401, 1981 Ark. Acts 705 (codified at ARK. STAT. ANN. §§ 77-1339 to -1342 (1981)).

32. 1981 Ark. Acts at 708-09.

33. The title of Act 401 of 1981 stated:

AN ACT to Provide That Ownership of Grain Shall Not Change by Reason of Delivery Thereof to Public Warehousemen and Title to Grain in the Possession of Public Grain Warehousemen Does Not Pass to Such Warehousemen Unless the Owner of the Grain Has by Written Document Signed by the Owner of the Grain Transferred Title to the Warehouseman; and for Other Purposes.

1981 Ark. Acts at 705-06.

by written documents executed specifically for that purpose.<sup>34</sup> Furthermore, the statute provides that any transfer of grain by a warehouseman who has not received written transfer of title from the depositor is void, notwithstanding any provision of the U.C.C. to the contrary.<sup>35</sup>

While the U.C.C. protected a good faith purchaser in the ordinary course of business from the claim of a depositor who entrusted grain to a warehouseman,<sup>36</sup> Act 401 has effectively exempted grain depositors from the operation of the U.C.C.<sup>37</sup> The ultimate effect of Act 401 has been to restore the pre-U.C.C. concept that a warehouseman's conveyance without the authorization of his depositor is void and conveys no title to any purchaser from him. Arkansas is the only state to adopt such a treatment of a warehouseman's unauthorized conveyances.<sup>38</sup>

The emergency clause of Act 401<sup>39</sup> exemplifies the frustrations and complaints of grain depositors responsible for initiating the legislation. The clause notes the findings of the General Assembly that grain depositors were "experiencing severe losses due to their stored grain in public warehouses being sold or encumbered by the public grain warehouseman without their authorization."<sup>40</sup> Act 401 was intended to clarify the question of ownership when grain is entrusted to a public grain warehouseman. Act 401 was also intended to protect grain owners from the harsh impact of the buyer in the ordinary course of business rule under the U.C.C.<sup>41</sup> Arkansas is the only state to vary from the U.C.C. concept of voidable title, allowing a grain depositor to recover from a buyer in the ordinary course of business, as defined under the U.C.C., in addition to possible recovery from the warehouseman with whom he deposited the grain.<sup>42</sup>

The Arkansas Supreme Court was first called upon to interpret Act 401 in *Simmons First National Bank v. Wells*.<sup>43</sup> The defendant claimed ownership of grain delivered to a public grain warehouseman

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34. ARK. STAT. ANN. § 77-1340 (1981).

35. *Id.* This specifically exempts grain depositors from the U.C.C. provisions that would have operated to protect a buyer in the ordinary course of business if the grain depositor entrusted his grain to the warehouseman. See ARK. STAT. ANN. § 85-2-403 (1961); ARK. STAT. ANN. § 85-7-205 (Supp. 1985).

36. See ARK. STAT. ANN. § 85-7-205 (Supp. 1985).

37. ARK. STAT. ANN. § 77-1340 (1981).

38. U.C.C. § 7-205, 2A U.L.A. 192 (Supp. 1987).

39. 1981 Ark. Acts 401, § 7.

40. *Id.*

41. Note, *supra* note 22, at 296-97.

42. U.C.C. § 7-205, 2A U.L.A. 192 (Supp. 1987).

43. 279 Ark. 204, 650 S.W.2d 236 (1983).

and proceeds from sales of that grain made by the warehouseman.<sup>44</sup> The defendant and the warehouseman orally agreed that the warehouseman would mill the defendant's grain and then market it at an agreed minimum price on behalf of the defendant.<sup>45</sup> The warehouseman agreed to deduct the milling and storage costs when the grain was sold and remit the proceeds to the defendant.<sup>46</sup> The warehouseman subsequently went into receivership, and the defendant intervened, asserting his claim of ownership of the grain and proceeds from previous sales of the grain. The lower court held for the defendant, finding that the arrangement constituted a bailment, and that the U.C.C. did not apply.<sup>47</sup> The court's holding gave the defendant's claim priority over those of the warehouseman's creditors. The creditors appealed the decision, alleging that the court erred in failing to apply the U.C.C.<sup>48</sup>

On appeal to the Arkansas Supreme Court, the defendant raised the application of Act 401 to the transaction for the first time, arguing that the warehouseman could not sell or encumber grain in his possession unless the owner has transferred title to the grain to him in writing.<sup>49</sup> Although the defendant was barred from arguing that Act 401 controlled the transaction since the issue was not raised at the trial court level, the Arkansas Supreme Court believed that the potential application of Act 401 was of sufficient importance to merit a retrial on the facts developed.<sup>50</sup>

The reversal and remand of *Wells* left Act 401 untested and unchallenged in the Arkansas Supreme Court. In 1985 the supreme court first interpreted Act 401 in two separate cases decided on the same day.<sup>51</sup> In *Farm Bureau Mutual Insurance Co. v. Wright*<sup>52</sup> the court applied Act 401 to a situation in which a farmer orally sold his grain to a public grain warehouseman, while in *Tucker v. Durham*<sup>53</sup> the court applied Act 401 to a situation in which a depositor of grain accepted an advance payment for grain he delivered to a warehouseman.

In *Wright*<sup>54</sup> the defendant orally sold his grain to a public grain

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44. *Id.* at 206, 650 S.W.2d at 236.

45. *Id.*

46. *Id.* at 206-07, 650 S.W.2d at 236.

47. *Id.* at 207-08, 650 S.W.2d at 236-37.

48. *Id.* at 207, 650 S.W.2d at 238.

49. *Id.* at 211-12, 650 S.W.2d at 240.

50. *Id.* at 212, 650 S.W.2d at 240.

51. *Farm Bureau Mut. Ins. Co. v. Wright*, 285 Ark. 228, 686 S.W.2d 778 (1985); *Tucker v. Durham*, 285 Ark. 264, 686 S.W.2d 402 (1985).

52. 285 Ark. 228, 686 S.W.2d 778 (1985).

53. 285 Ark. 264, 686 S.W.2d 402 (1985).

54. 285 Ark. 228, 686 S.W.2d 778 (1985).

warehouse for a stated price in a "spot" sale.<sup>55</sup> Checks issued by the warehouseman were later dishonored and the defendant sought to recover on the warehouseman's bond and from the company that purchased his grain from the warehouseman.<sup>56</sup> The Arkansas Supreme Court, relying on Arkansas Statutes Annotated section 77-1315(a), conditioned payment to grain depositors from the warehouseman's bond on the holding of warehouse receipts. Since the defendant did not hold warehouse receipts for his grain stored with the warehouseman, the court dismissed his claim for payment on the bond.<sup>57</sup> The supreme court then addressed the possible application of Act 401 to the defendant's case.<sup>58</sup>

The defendant contended that Act 401 voided the oral sale of grain to the warehouseman since the defendant failed to execute written documents specifically conveying title to the grain to the warehouseman.<sup>59</sup> The Arkansas Supreme Court examined the language of Arkansas Statutes Annotated section 77-1340 and determined that Act 401 only voided sales of grain made by a warehouseman after the depositor delivered grain to the warehouseman for storage.<sup>60</sup> The defendant never delivered his grain to the warehouseman for storage, since the facts revealed that the defendant orally sold the grain to the warehouseman while the grain was still at his farm and never stored the grain with the warehouseman.<sup>61</sup> The supreme court relied heavily on the emergency clause of Act 401, which revealed that the purpose of Act 401 was to protect owners who stored their grain in public warehouses.<sup>62</sup> The court also stated that coverage under Act 401 is limited to the holders of warehouse receipts, and that Act 401 does not operate to void all sales of grain made by a public grain warehouseman.<sup>63</sup> Since the defendant possessed no warehouse receipts for the deposited grain, he was denied relief under the provisions of Act 401.<sup>64</sup>

The Arkansas Supreme Court examined the application of Act

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55. 285 Ark. at 230-31, 686 S.W.2d at 780-81 (a "spot" sale of grain is one made at the farmer's farm prior to delivery to a warehouse).

56. *Id.* at 230-31, 686 S.W.2d at 780-81.

57. *Id.* at 231, 686 S.W.2d at 781. "The bond shall be conditioned upon such warehouseman delivering all stored grain or payment of the value thereof upon the surrender of the warehouse receipt." ARK. STAT. ANN. § 77-1315(a) (1981).

58. 285 Ark. at 231, 686 S.W.2d at 781.

59. *Id.* at 233, 686 S.W.2d at 782.

60. *Id.* at 231-32, 686 S.W.2d at 781.

61. *Id.*

62. *Id.* at 232-33, 686 S.W.2d at 782.

63. *Id.* at 233, 686 S.W.2d at 782.

64. *Id.*

401 to deferred pricing contracts<sup>65</sup> in *Tucker v. Durham*<sup>66</sup> decided the same day as *Wright*. An intervening plaintiff<sup>67</sup> signed a deferred pricing contract with the defendant warehouseman upon delivery of grain to the warehouseman for storage. Upon execution of the deferred pricing contract the plaintiff received an advance payment for the grain delivered.<sup>68</sup> The supreme court was asked to determine whether or not a depositor of grain who receives an advance payment upon delivery of the grain to a warehouseman is considered to have sold the grain to that warehouseman.<sup>69</sup>

The court, consistent with its holding in *Wright*, examined the language of Arkansas Statutes Annotated section 77-1340 and determined that the primary purpose of Act 401 was to protect storers of grain.<sup>70</sup> The supreme court found that the language of the statute required a depositor of grain in a public warehouse to specifically transfer title to the stored grain to the warehouseman by written document, in order to convey title to the deposited grain.<sup>71</sup> Examining the language contained in the deferred pricing contract signed by the plaintiff grain depositor, the court found it ineffective to transfer title to the warehouseman under the requirements of the statute.<sup>72</sup> The court held that the plaintiff's receipt of advance payment for the grain delivered, without a specific conveyance of title to the grain in writing, did not operate to remove him from the protection of Act 401.<sup>73</sup> The supreme court viewed its determination that the receipt of advance payments without a written transfer of title does not constitute a sale, as consistent with Article 2 of the U.C.C.<sup>74</sup> A sale is defined under Article 2 as a passage of title

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65. Deferred pricing contracts are contracts for the sale of grain at a future date even though the grain is delivered at the time the contract is executed. The depositor has the option to set the final selling price at his choosing on some date in the future. Note, *supra* note 22, at 304 n.79.

66. 285 Ark. 264, 686 S.W.2d 402 (1985).

67. The plaintiff, Tucker, as public grain warehouse commissioner, was acting as the receiver for Durham, a public grain warehouseman. A grain depositor intervened in the suit alleging that the contracts he signed with the defendant were not effective to convey title to the deposited grain to the defendant. *Id.* at 265, 686 S.W.2d at 403.

68. *Id.* at 265-66, 686 S.W.2d at 403.

69. *Id.*

70. *Id.* at 267, 686 S.W.2d at 404.

71. *Id.* (citing ARK. STAT. ANN. § 77-1340 as follows: "[N]o public grain warehouseman shall sell or encumber any grain . . . unless the owner of the grain has by written document transferred title of the grain to the warehouseman.").

72. 285 Ark. at 267-68, 686 S.W.2d at 404 (the language used in the contract did not conspicuously indicate that title was being transferred, and the court felt the defendant's conduct in executing these contracts was almost fraudulent in the inducement).

73. *Id.* at 267, 686 S.W.2d at 404.

74. *Id.* See ARK. STAT. ANN. § 85-2-106(1) (1961).

from the seller to a buyer for a price, and since Act 401 requires a specific conveyance of title in writing no sale occurred between the plaintiff and the warehouseman.<sup>75</sup>

In the holdings of *Wright* and *Tucker*, the Arkansas Supreme Court laid down two specific rules governing the application of Act 401. First, Act 401 only protects depositors of grain for storage in public warehouses, and does not extend to anyone who has made an outright sale of his grain to the warehouseman without storing it with the warehouseman prior to the sale.<sup>76</sup> Second, the mere execution of a deferred pricing contract and the receipt of advance payment on that contract by a depositor upon delivery of grain to a public grain warehouseman does not constitute a sale, and thus Act 401 does apply.<sup>77</sup>

In *Cooper, Inc. v. Farm Bureau Mutual Insurance Co.*<sup>78</sup> the Arkansas Supreme Court was again asked to examine the application of Act 401 to a situation in which a depositor executed a deferred price contract with the public grain warehouseman.<sup>79</sup> The court quickly disposed of the question of Farm Bureau Mutual Insurance Company's liability on the surety bond of Harrisburg, since Cooper and Block did not hold warehouse receipts as required to recover on a warehouseman's bond<sup>80</sup> under Arkansas Statutes Annotated section 77-1315(a).<sup>81</sup> The supreme court affirmed the summary judgment granted by the trial court to Farm Bureau Mutual Insurance Company of Arkansas, Inc.<sup>82</sup>

The supreme court proceeded to examine the question of ownership of the grains stored by Harrisburg.<sup>83</sup> Cooper and Block contended that the deferred pricing contracts signed with Harrisburg failed to contain a provision specifically conveying title to the soybeans to Harrisburg. Harrisburg argued that the language of the contract sufficed to

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75. 285 Ark. at 267, 686 S.W.2d at 404; ARK. STAT. ANN. § 77-1340 (1981).

76. *Farm Bureau Mut. Ins. Co. v. Wright*, 285 Ark. 228, 229, 686 S.W.2d 778, 780 (1985).

77. *Tucker v. Durham*, 285 Ark. 264, 267, 686 S.W.2d 402, 404 (1985).

78. 289 Ark. 218, 711 S.W.2d 155 (1986).

79. *Id.* at 221, 711 S.W.2d at 158.

80. *Id.* at 220-21, 711 S.W.2d at 157. The court failed to extend ARK. STAT. ANN. § 77-1302 (Supp. 1985) to the scale ticket held by Cooper and Block. Cooper and Block alleged that the statute converted their scale tickets to warehouse receipts and thus they were covered under Harrisburg's bond. The court held that the statute was not retroactive, and that since the transactions occurred well before the effective date of the Act they did not hold warehouse receipts. 289 Ark. at 220-21, 711 S.W.2d at 157.

81. ARK. STAT. ANN. § 77-1315(a) (1981).

82. 289 Ark. at 220-21, 711 S.W.2d at 157.

83. *Id.* at 221, 711 S.W.2d at 158.

transfer title.<sup>84</sup> The court compared the facts and circumstances of this case with those of *Wright*, and determined that *Wright* was distinguishable since the grain depositor in *Wright* admittedly made a sale of his grain to the warehouse at his farm, and that the issue there was whether Act 401 applied to grain that was sold outright to, and never stored by, the warehouseman.<sup>85</sup> The court held that *Wright* was of only general relevance to Cooper and Block's case.<sup>86</sup>

The supreme court deemed the case to be most similar to *Tucker v. Durham*, since both cases dealt with a depositor of grain, a subsequent sale of the stored grain by the warehouseman to a third party, the execution of deferred pricing contracts, and the depositor's receipt of advance payment upon delivery of the grain to the warehouseman.<sup>87</sup> The depositors received advance payments from the warehouseman that were credited against the final purchase price paid for the grain upon completion of the sale. The court re-emphasized its holding in *Tucker* that the receipt of advance payment does not remove the depositor from the protection of Act 401, and unless a transfer of title in writing has occurred, the grain is deemed to be stored rather than sold.<sup>88</sup>

Armed with the holding in *Tucker* that a specific transfer of title from the depositor to the warehouseman must occur in order for there to be a sale, the court faced the question of whether or not the contract executed between Cooper, Block, and Harrisburg transferred title to the grain. The court examined the language of Act 401 to aid in its determination of whether title was transferred.<sup>89</sup> The court indicated that the legislature left no doubt concerning the transfer of title to grain stored in a public warehouse when it declared that "no title shall be transferred unless title is *specifically conveyed* to the warehouseman by a written document signed by the owner."<sup>90</sup> The court held that such imperative language must be taken literally, and that such imperative language requires literal compliance to accomplish the intent and purpose of the statute.<sup>91</sup>

In support of its determination that the statute's literal terms were not complied with, the court relied on various facts and circumstances

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84. *Id.* at 221-22, 711 S.W.2d at 158.

85. *Id.* at 222, 711 S.W.2d at 158.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 223, 711 S.W.2d at 159.

90. *Id.* at 222-23, 711 S.W.2d at 158 (emphasis original).

91. *Id.* at 223, 711 S.W.2d at 158.

surrounding the deferred price contract used by Harrisburg. The facts indicated that the Arkansas State Plant Board had notified Harrisburg one full year prior to the execution of the contracts with Cooper and Block that the language used in its deferred pricing contracts was deficient, and that it should include a statement that the depositor understands that he is transferring title of the grain to Harrisburg. The court deemed Harrisburg's continued use of the contracts that failed to include language transferring title fatal to Harrisburg's argument that Cooper and Block transferred title of their grain to it. The court inferred that had Harrisburg complied with the State Plant Board's directives and revised the language contained in their contracts, there would be little basis for any misunderstanding concerning the title to the stored grain.<sup>92</sup>

Additionally, the contracts contained language concerning the determination of Harrisburg's fee for storing the grain prior to the date that the final price was determined. The court reasoned that if Harrisburg were the owner of the grain, Cooper and Block would not be responsible for a storage fee.<sup>93</sup> Viewing the totality of the circumstances, the court held that the contracts failed to comply with Act 401, and that Harrisburg's argument of substantial compliance with Act 401 failed for lack of supporting evidence.<sup>94</sup> Consequently, the court held that Cooper and Block did not transfer title to Harrisburg, and remanded the case as to Harrisburg and the four grain companies for trial on the issues.<sup>95</sup>

*Cooper* gave the Arkansas Supreme Court a second opportunity to examine the application of Act 401 of 1981 to ordinary grain transactions. The court was able to re-emphasize its holding that Act 401 only protects persons delivering grain for storage to public grain warehousemen, and not those who sell grain outright to the warehouseman. The court also re-emphasized that a depositor's signing of a deferred pricing contract upon delivery of grain to a public grain warehouse does not constitute a sale of that grain to the warehouseman unless the signed contract specifically contains language transferring the title of the grain to the warehouseman.

The holding states that the language contained in the contract will be used to determine whether it is sufficient to meet the requirements of Act 401 and effectively transfer title of the grain to the warehouse-

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92. *Id.* at 223, 711 S.W.2d at 159.

93. *Id.* at 223-24, 711 S.W.2d at 159.

94. *Id.* at 224, 711 S.W.2d at 159.

95. *Id.*

man. The court's view that a strict and literal construction of the language in Arkansas Statutes Annotated section 77-1340 is required, creates a bright line test to be used in determining whether contract language will be effective to transfer title. The language of the statute mandates that in order to transfer title to a public grain warehouseman, the owner must execute a written document which specifically conveys that title.

*Cooper* should cause every state licensed public grain warehouse to review the language contained in its deferred pricing contracts. A warehouseman's failure to reexamine language contained in its contracts could potentially expose the warehouseman to dual liability in situations in which he has conveyed and transferred grain to a subsequent purchaser. Under Act 401, the depositor would be allowed to make a claim against the warehouseman for the value of the grain or against the subsequent purchaser, and the subsequent purchaser would have a cause of action against the warehouseman in the event the depositor obtained relief from him under Act 401.

The passage of Act 401 in 1981 completed a full circle for Arkansas law governing the rights of grain depositors and public grain warehousemen. Prior to the adoption of the U.C.C. in 1961 a transfer by a warehouseman of any goods stored by him conveyed no title to the goods since any transfer by him constituted a conversion of those goods.<sup>96</sup> Arkansas law at that time held that any transfer of title to converted goods was void.<sup>97</sup> The adoption of the U.C.C. created the concept of a warehouseman's "voidable" title to grain stored by him.<sup>98</sup> The concept controlled grain transactions until the passage of Act 401 in 1981. Act 401 renders a warehouseman's title to grain stored by him void when the warehouseman fails to deliver grain to the holder of a warehouse receipt or erroneously delivers the grain to someone other than the holder of the warehouse receipt.<sup>99</sup> Thus, the Act has effectively returned Arkansas public grain warehouse law to its pre-U.C.C. posture.

*Price C. Gardner*

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96. *G.H. Hardin & Co. v. Nettles*, 192 Ark. 610, 93 S.W.2d 315 (1936).

97. *Newburger Cotton Co. v. Stevens*, 167 Ark. 257, 267 S.W. 777 (1925); *Creson v. Ward*, 66 Ark. 209, 49 S.W. 827 (1899).

98. ARK. STAT. ANN. § 85-7-205 (1961) (amended 1981); ARK. STAT. ANN. § 85-2-403 (1961) (a person has voidable title when he has the power to transfer a good title to a good faith purchaser for value).

99. ARK. STAT. ANN. § 77-1340 (1981) states in part: "[A]ll sales and encumbrances of grain by public grain warehousemen are void and convey no title . . . ."

